# Chan Kok Sung & Anor v Accupro Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(A)-2403–12 OF 2022
RAVINTHRAN, MARIANA YAHYA AND AZIMAH OMAR JJCA
5 APRIL 2024

*Equity — Estoppel — Res judicata — Respondent entered into agreement ('SA') with judgment creditors to pay off sum owed to them by company they had wound up — In consideration for SA, appellants agreed to have winding up order ('WU order') vacated — Respondent defaulted after making two years' of payments under SA — Respondent applied to have SA declared void and for all payments it had made thereunder to be refunded on ground WU order was obtained irregularly — Whether respondent was estopped from challenging validity of WU order — Whether respondent had implicitly acknowledged validity of WU order from the outset and throughout its partial performance of SA — Whether validity of WU order was never in question or under challenge when court set it aside — Whether res judicata and estoppel applied to bar validity of WU order from being re-litigated — Whether respondent had not come to court with clean hands but deviously used illegality to escape payment obligations under SA*

The first respondent ('Accupro') entered into a settlement agreement ('SA') with the appellants to pay the appellants RM10,000 per month until a global sum of RM421,143.28 owed to the appellants by a company ('SME Majujaya') which they had wound up, was fully settled. In consideration for Accupro's said undertaking, it was agreed that the winding up order ('WU order') against SME Majujaya would be vacated. The second respondent guaranteed Accupro's performance under the SA. Pursuant to the SA, the WU order was set aside without contest. After having paid RM150,000 under the SA to the appellants over a period of two years, Accupro suddenly took the position that the SA was fraudulent and a nullity. Accupro filed an originating summons ('OS') for, inter alia: (a) a declaration that the SA was void or voidable by Accupro; and (b) an order that the SA be set aside or terminated with immediate effect and that the appellants refund all payments that Accupro had made to them under the SA. In response, the appellants counterclaimed for enforcement of the SA. The High Court ('HC') allowed the OS and dismissed the counterclaim holding that the SA was voidable at Accupro's option as the WU order was an irregularity as SME Majujaya was not informed of the adjourned hearing date of the winding up petition. The HC ordered the appellants to refund all monies that Accupro had paid to them under the SA. The instant appeal was against the HC's decision.

**Held,** allowing the appeal, setting aside the High Court's decision and allowing the appellants' counterclaim:

(1) The winding up order ('WU order') was not set aside due to it being an irregularity or a nullity but in furtherance of the agreed terms under the SA. The validity of the WU order was already litigated and determined when the application to set aside the order was decided by the winding up court. The setting aside application went uncontested and was allowed in reliance upon the SA. Therefore, there already existed a pre-existing judicial decision of the winding up court that had not found the WU order to be a nullity or an irregularity. The decision of the winding up court was never appealed against by any of the parties. It was wrong for the respondents to file the OS before a different High Court to re-litigate the validity of the WU order as doing so offended the principles of *res judicata* and estoppel. The very fact that the respondents entered into the SA was because they recognised or acknowledged that the WU order was valid (see paras 19–22 & 32).

(2) In the absence of any irregularity to impugn the validity of the WU order, it was wrong of the court below to re-litigate the issue and to hold that the Order was a nullity due to an alleged failure by the appellants to inform SME Majujaya of the adjourned hearing date of the winding up petition. The facts concerning the WU order had all the while been within the knowledge of the respondents. If there was any truth to the alleged failure by the appellants, the respondents would never have proceeded with the SA. It was certainly more probable than not that the respondents were aware that the WU order was regularly obtained (see para 30).

(3) The respondents had not come to court with clean hands and ought to be estopped from using illegality as a front to renege from their obligations under the SA. For two years, the respondents had performed the SA and were only raising the issue of illegality when they defaulted in their payment obligations under the SA (see paras 39 & 44).

(4) The SA was not illegal and had not transgressed the rule on undue preference under s 528 of the Companies Act 2016, as contended by Accupro, because by the time Accupro made payment to the appellants under the SA, SME Majujaya had been lifted out of liquidation and had gone back to being a going concern. In any event, the monies that Accupro paid under the SA were from its own coffers as the respondents were liable as principal debtors to the appellants under the SA (see paras 45, 49 & 58).

(5) The appellants' counterclaim was allowed, inter alia, on the following terms – that the SA was a valid agreement under the law and that in view of Accupro's breach of the SA, the appellants were entitled to

immediately call for payment of the remaining unpaid sum of RM221,143.28 under the SA with 5%pa interest thereon from 1 June 2021 until date of full and final payment of the said sum (see para 60).

**[Bahasa Malaysia summary**

Responden pertama ('Accupro') memasuki perjanjian penyelesaian ('SA') dengan perayu untuk membayar perayu RM10,000 sebulan sehingga jumlah keseluruhan RM421,143.28 yang perlu dibayar kepada perayu oleh sebuah syarikat ('SME Majujaya' ) yang telah mereka gulungkan, telah diselesaikan sepenuhnya. Sebagai balasan terhadap akujanji Accupro, ia telah dipersetujui bahawa perintah penggulungan ('perintah WU') terhadap SME Majujaya akan dilepaskan. Responden kedua memberi jaminan pelaksanaan Accupro di bawah SA. Menurut SA, perintah WU telah diketepikan tanpa bantahan. Selepas membayar RM150,000 di bawah SA kepada perayu-perayu dalam tempoh dua tahun, Accupro tiba-tiba mengambil pendirian bahawa SA itu adalah penipuan dan terbatal. Accupro memfailkan saman pemula ('SP') untuk, antara lain: (a) pengisytiharan bahawa SA adalah terbatal atau boleh dibatalkan oleh Accupro; (b) perintah supaya SA diketepikan atau ditamatkan berkuat kuasa serta-merta dan perayu membayar balik semua pembayaran yang telah dibuat oleh Accupro kepada mereka di bawah SA. Sebagai balasan, perayu-perayu membuat tuntutan balas untuk penguatkuasaan SA. Mahkamah Tinggi ('MT') membenarkan OS dan menolak tuntutan balas dengan memutuskan bahawa SA boleh terbatal mengikut pilihan Accupro kerana perintah WU adalah tidak sah kerana SME Majujaya tidak dimaklumkan mengenai tarikh pendengaran petisyen penggulungan yang ditangguhkan. MT mengarahkan perayu memulangkan semua wang yang telah dibayar Accupro kepada mereka di bawah SA. Rayuan semasa adalah terhadap keputusan MT.

**Diputuskan**, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan tuntutan balas perayu:

(1) Perintah penggulungan ('perintah WU') tidak diketepikan kerana ia merupakan ketidaksahan atau batal tetapi sebagai lanjutan daripada terma yang dipersetujui di bawah SA. Kesahihan perintah WU telah pun dibicarakan dan ditentukan apabila permohonan untuk mengetepikan Perintah itu diputuskan oleh mahkamah penggulungan. Permohonan mengetepikan tidak ditentang dan dibenarkan bergantung kepada SA. Oleh itu, sudah ada keputusan kehakiman sedia ada mahkamah penggulungan yang tidak mendapati perintah WU sebagai batal atau tidak sah. Keputusan mahkamah penggulungan tidak pernah dirayu oleh mana-mana pihak. Ia adalah salah bagi responden memfailkan SP di hadapan Mahkamah Tinggi yang berbeza untuk membicarakan semula kesahihan perintah WU kerana berbuat demikian melanggar prinsip *res judicata* dan estoppel. Fakta bahawa

responden memasuki SA adalah kerana mereka mengiktiraf atau mengakui bahawa perintah WU adalah sah (lihat perenggan 19–22 & 32).

(2) Sekiranya tiada sebarang ketidaksahan untuk menafikan kesahihan perintah WU, ia adalah salah bagi mahkamah di bawah untuk membicarakan semula isu itu dan memutuskan bahawa perintah itu adalah terbatal disebabkan oleh kegagalan yang dikatakan oleh perayu untuk memaklumkan SME Majujaya mengenai tarikh pendengaran petisyen penggulungan yang ditangguhkan. Fakta mengenai perintah WU selama ini berada dalam pengetahuan responden. Sekiranya terdapat sebarang kebenaran terhadap dakwaan kegagalan oleh perayu, responden tidak akan pernah meneruskan SA. Ianya sudah tentu lebih berkemungkinan daripada tidak bahawa responden sedar bahawa perintah WU diperolehi secara sempurna (lihat perenggan 30).

(3) Responden tidak datang ke mahkamah dengan niat yang suci dan sepatutnya dihalang daripada menggunakan penyalahan undang-undang sebagai medan untuk mengingkari kewajipan mereka di bawah SA. Selama dua tahun, responden telah melaksanakan SA dan hanya membangkitkan isu ketidaksahan apabila mereka ingkar dalam kewajipan pembayaran mereka di bawah SA (lihat perenggan 39 & 44).

(4) SA tidak menyalahi undang-undang dan tidak melanggar peraturan mengenai keutamaan yang tidak wajar di bawah s 528 Akta Syarikat 2016, seperti yang dipertikaikan oleh Accupro, kerana pada masa Accupro membuat pembayaran kepada perayu di bawah SA, SME Majujaya telah dilepaskan daripada penggulungan dan telah kembali beroperasi. Dalam apa jua keadaan, wang yang Accupro bayar di bawah SA adalah daripada tabungnya sendiri kerana responden bertanggungjawab sebagai penghutang utama kepada perayu di bawah SA (lihat perenggan 45, 49 & 58).

(5) Tuntutan balas perayu dibenarkan, antara lain, atas terma berikut — bahawa SA adalah perjanjian yang sah di bawah undang-undang dan memandangkan pelanggaran Accupro terhadap SA, perayu berhak untuk segera meminta pembayaran baki jumlah yang belum dibayar sebanyak RM221,143.28 di bawah SA dengan faedah 5% setahun dari 1 Jun 2021 sehingga tarikh pembayaran penuh dan akhir jumlah tersebut (lihat perenggan 60).]

**Cases referred to**

*Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (refd)
*Ebert Construction Ltd v Sanson* [2017] NZCCLR 28, CA (folld)
*Khatijah bt Abdullah & Ors v Mohd Isa bin Biran* [2017] 2 MLJ 1, FC (folld)

*Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141, FC (refd)
*Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)* [2019] 2 MLJ 137, FC (refd)
*Patel v Mirza* [2016] UKSC 42, SC (folld)
*Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor & Ors* [2016] 8 MLJ 289, HC (refd)
*Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd* [2011] 5 MLJ 416, CA (refd)

**Legislation referred to**

Companies Act 2016 s 528

**Appeal from:** Originating Summons No BA-24NCC-92–09 of 2021 (High Court, Shah Alam)

*Jarrett Ong Kah Lok (with Jolyn Ch'ng Fern and Lee Chia Yee) (Han Ch'ng & Partners) for the appellants.*
*Rishwant Singh (with Wong Hur Shiaw (Wallace)) (Wong & Lu-Yen Partnership) for the respondents.*

**Azimah Omar JCA:**

INTRODUCTION

**[1]** The appeal before us is a case of a contractual party ('the first respondent') attempting to unlawfully extricate itself from the contract it voluntarily entered into despite the fact that the first respondent had already partially performed the contract.

**[2]** The first respondent in this present appeal had by their own initiative, offered to undertake to settle the judgment debt of another company (in liquidation) owed to the appellants ('the petitioners') vide a settlement agreement. As consideration of the first respondent's undertaking and indemnity, the appellants must agree to allow (and not object) to having the winding up order against the judgment-debtor company be set aside. The winding up order was duly set aside by the winding up court in view of the parties' autonomy and mutual agreement to settle the debt out of court.

**[3]** Two years since had passed and almost 40% (RM150,000) of the judgment debt was settled by the first respondent in compliance of the settlement agreement. A salient fact which clearly envisages the first respondent's unequivocal admission to the validity of the settlement agreement, the truth of the judgment-creditor company's debt owed to the appellants, and even the validity of the winding up order obtained against the judgment-creditor company. The second respondent even entered into a

guarantee agreement as guarantor, to guarantee that the first respondent shall pay as per the terms of the settlement agreement.

**[4]** It is strange that after the partial performance of the settlement agreement (and full admission of the validity of the judgment debt as well as the winding up order) the first respondent sought (vide originating summons) to renege from the settlement agreement and now insisted that the settlement agreement was fraudulent and was a nullity. This was despite the unequivocal admissions of the first respondent and the fact that the winding up court was already *functus officio* as it had already set aside the winding up order in view of the parties' settlement agreement.

**[5]** The appellants retorted by filing its own counterclaim against the respondents so as to enforce the terms of the settlement agreement which was unequivocally and unconditionally agreed upon by the first respondent.

**[6]** The learned judicial commissioner ('learned JC') on 16 December 2022 had allowed the respondents' originating summons to invalidate the settlement agreement (despite the learned JC's own finding that there were no elements of fraud or deceit from the appellants). Consequently, the learned JC also dismissed the appellants' counterclaim.

**[7]** Dissatisfied with the self-contradictory decision of the learned JC, the appellants filed this appeal before us. It must be noted that the respondents had not appealed against the entirety or any part of the learned JC's decision. Thus, it is patently clear that the respondents unequivocally admitted the truth in the learned JC's decision that there were no elements of fraud, concealment, or deceit emanating from the settlement agreement or the winding up order. Thus, it shall not be open for the respondents to contend on any allegation of fraud, concealment, or deceit in the appellants' appeal before us.

**[8]** For a proper appreciation of the contentions above, it is crucial that we first understand the facts underlying this case.

FACTS OF THE CASE

**[9]** On 28 March 2019, the appellants ('Chan Kok Sung and Chan Wai Kit') commenced a Winding-Up Petition No WA-28NCC-293–03 of 2019 against the judgment debtor company ('SME Majujaya') and successfully obtained a winding up order on 11 June 2019 ('WU order').

**[10]** The first respondent ('Accupro') approached the appellants and offered to undertake and settle the judgment debt owed by SME Majujaya. Accupro

and the appellants entered into a *settlement agreement* on 3 July 2019 ('settlement agreement'). A

**[11]** The salient terms of the settlement agreement, amongst others, are:

(a) cl 1.1(a) and (b) — Accupro will settle a global sum of RM421,143.28 on behalf of SME Majujaya by way of monthly instalment of RM10,000 to the appellants commencing from 1 July 2019 until full settlement inclusive of legal costs of RM50,000 to the appellants' solicitors; and B

(b) cl 1.1(d) — in consideration of the settlement, the appellants have no objection to terminate and/or stay the winding up order against SME Majujaya with all costs to be borne by Accupro. C

**[12]** Tan Chin Siea ('second respondent/guarantor') entered into a guarantee agreement dated 3 July 2019 as guarantor who indemnifies and guarantees that Accupro shall remit the payments as agreed under the settlement agreement. D

**[13]** After the execution of the settlement agreement, SME Majujaya subsequently filed an application to set aside the winding up order under Case No WA-28PW-526–08 of 2019 before the winding up court ('setting aside application'). In view of respecting the parties' mutual agreement to have Accupro undertake and settle the debt on behalf of SME Majujaya, the WU order against SME Majujaya was set aside by the winding up court uncontested. E F

**[14]** In admission and partial compliance to the settlement agreement, Accupro, incrementally paid a total sum of RM150,000 to the appellants for over a period of *TWO YEARS* from 5 September 2019 up to 31 May 2021. G

**[15]** On 13 September 2021 (after two whole years of complying and admitting the validity of the settlement agreement) Accupro (the first respondent here) sought to make a full u-turn to go against its own prior admissions (of the validity of the WU order and the settlement agreement) by filing an Originating Summons No BA-24NCC-92–09 of 2021 ('the first respondent's OS') in the High Court seeking for the following reliefs: H

(1) Satu deklarasi bahawa Perjanjian Penyelesaian bertarikh 3.7.2019 antara Plaintif dan Defendan-Defendan ('Perjanjian Penyelesaian tersebut') adalah terbatal (void), dan/atau sebaliknya boleh dibatalkan (voidable) atas pilihan Plaintif; I

(2) Satu perintah bahawa Perjanjian Penyelesaian tersebut adalah oleh itu diketepikan, dibatalkan secara ab initio, atau ditamatkan dengan serta merta;

(3) Lanjutan daripada perintah-perintah di atas, satu perintah bahawa:

(a) Semua pembayaran yang telah dibuat oleh Plaintif kepada Defendan-Defendan berdasarkan Perjanjian Penyelesaian tersebut dibayar balik dan/atau dipulihkan kepada Plaintif dalam masa 14 hari daripada tarikh Perintah ini; dan/atau

(b) Plaintif dipampas dengan kos yang bersamaan dengan jumlah pernbayaran yang telah dibuat setakat ini oleh Plaintif kepada Defendan-Defendan, atau dipampas dengan satu jurnlah yang diputuskan oleh Mahkamah Mulia ini, juga dalam tempoh masa 14 hari daripada tarikh Perintah ini.

(4) Satu deklarasi bahawa Defendan-Defendan telah secara bersama dan berasjngan menganiayai proses Mahkamah Mulia ini, atau sebaliknya telah melakukan tort penipuan terhadap Plaintif antara lainnya dengan memperolehi satu perintah penggulungan syarikat yang tidak sah terhadap satu 'SME Majujaya Sdn Bhd (Syarikat No: 1056973-W)' melalui Mahkamah Tinggi Kuala Lumpur Penggulungan Syarikat No: WA-28NCC-293-03/2019 pada 11.06.2019 dan menggunakan perintah itu sebagai dasar dalam Perjanjian Penyelesaian tersebut dengan Defendan-Defendan tanpa penglibatan SME Majujaya Sdn Bhd tersebut;

(5) Selaras dengan dan/atau secara alternatif kepada di atas, satu deklarasi bahawa Defendan-Defendan dan/atau proxi(-proxi), wakil(-wakil) dan/atau ejen(-ejen) mereka masing-masing adalah memegang jumlah pembayaran sebanyak RM150,000.00 daripada Plaintif secara amanah untuk kepentingan dan manfaat Plaintif, dan diarahkan untuk memulangkan dan/atau memulihkan jumlah tersebut kepada Plaintif dalam masa 14 hari daripada Perintah ini;

(6) Faedah atas kadar faedah 1.5% sebulan atas jumlah-jumlah yang disebut dalam perenggan-perenggan (3)(a), (3)(b) dan (5) di atas, dari 05.09.2019 ke 31.05.2021;

(7) Gantirugi Am;

(8) Gantirugi Teladan;

(9) Faedah atas kadar 8% setahun atas jumlah-jumlah yang disebut dalam perenggan-perenggan (3), (5), (6), (7) dan/atau (8) di atas;

(10) Kebebasan diberikan kepada Plaintif untuk memohon;

(11) Kos ditanggung oleh Defendan-Defendan; dan/atau

(12) Relif-relif atau perintah-perintah lain yang Mahkamah Mulia ini berfikir sesuai dan berpatutan untuk memberikan.

**[16]** The appellants as a retort, filed a counterclaim seeking for the following prayers:

(a) a declaration that the settlement agreement between the appellants and Accupro dated 3 July 2019 is terminated due to Accupro's default;

(b) Accupro and SME Majujaya shall jointly and severally make payment of the outstanding amount of RM221,143.28 to Chanlite Lv Engineering Sdn Bhd;

(c) a monthly interest of 2% on the sum of RM221,143.28 from 1 June 2021 to the date of full settlement;

(d) costs; and

(e) any other reliefs or orders that the honourable court deems fit and proper to grant.

BEFORE THE HIGH COURT

**[17]** The learned JC allowed prayers 1, 2, 3A, and 5 of Accupro's claim and dismissed the appellants' counterclaim on the following grounds:

(a) the learned JC declared that the settlement agreement is voidable at the option of Accupro as the winding up order on which the settlement agreement was premised on, was made in the absence of SME Majujaya because SME Majujaya was not informed of the adjourned hearing date;

(b) the learned JC ordered all monies paid thus far by Accupro to the appellants be refunded within 14 days from the date of the High Court order or any such date agreed between the parties; and

(c) the learned JC dismissed all of the respondent's contention on fraud, tort of deceit and concealment emanating from the appellants as there was no evidence to support the respondent's allegations.

THE APPEAL BEFORE US

**[18]** We have perused the appellant's memorandum of appeal, records of appeal, and the parties' respective written submissions and we are of the mind that the appeal before us can be appropriately be disposed by determining the following issues:

(a) issue 1: whether it was appropriate and right for the learned JC to re-litigate and making a third and subsequent decision regarding the impugned WU order which the Winding Up Court had already set aside in view of the settlement agreement;

(b) issue 2: whether the respondents had come to court with clean hands or ought to be estopped from wielding illegality as a front to unjustly renege from the respondents' own series of admissions; and

(c) issue 3: whether the settlement agreement was illegal by transgressing the

rule of undue preference under s 528 of the Companies Act 2016.

ISSUE 1: WHETHER IT WAS APPROPRIATE AND RIGHT FOR THE LEARNED JC TO RE-LITIGATE AND MAKING A THIRD AND SUBSEQUENT DECISION REGARDING THE IMPUGNED WU ORDER WHICH THE WINDING UP COURT HAD ALREADY CONFIRMED ITS VALIDITY AND ONLY SET ASIDE IN VIEW OF THE SETTLEMENT AGREEMENT

**[19]** It is crucial that we do not lose sight of the fact that the validity of the WU order had already been litigated and decided upon vide setting aside application. The setting aside application was kicked into gear in all parties' mutual adherence and compliance of the settlement agreement. The setting aside application went on uncontested and was allowed under the pretext and reliance of the settlement agreement.

**[20]** This decision by the Winding Up Court was significantly crucial as the WU order was not determined to be a nullity or irregular. Instead the WU order was set aside in adherence and accordance to the terms agreed under the settlement agreement. Therefore, *there already existed a pre-existing judicial decision of the Winding Up Court that had not found the WU order to be null or irregular*. This decision by the Winding Up Court *WAS NEVER APPEALED AGAINST* by any parties.

**[21]** The respondents cannot now feign ignorance and expect us to turn a blind eye to the true and actual genesis of the setting aside of the WU order. The WU order was not set aside due to any irregularities or nullity but instead was set aside in view of the settlement agreement. The respondents cannot now go behind the WU Court's decision and go before another High Court to 'modify' or 'vary' the true context and grounds the WU order which was previously set aside.

**[22]** The respondents' attempt to re-litigate the validity of the WU order transgressed not only trite written laws but also offended salient principles in equity (*res judicata* and *estoppel*).

**[23]** It need be reminded that as a general rule, no subsequent High Court can re-litigate the same matter so as to negate, modify, or vary the perfected order of the prior High Court. A winding up order is no exception to this general rule. This would lead to much confusion of having two contradicting decisions of two High Courts on the same singular matter. We need only refer to the Federal Court decision in *Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)* [2019] 2 MLJ 137:

> It is trite that generally, *a court becomes functus officio and has no power to vary an*

*order after it has been drawn up. One High Court cannot set aside a final order made by another High Court of concurrent jurisdiction*. An exception to this rule is where an order was irregularly obtained. The inherent jurisdiction of the court to set aside such an order was succinctly expressed in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36.

**[24]** The known exception to the general rule is that the court would have the inherent jurisdiction to set aside a prior order of the High Court if it can be proven that the prior order was irregularly obtained. In such circumstance, a second High Court would hold the jurisdiction to set aside such irregularly obtained order.

**[25]** We must emphasise that in the appeal before us, the WU order was set aside not because of any nullity or irregularity. The WU order was set aside in furtherance of the performance of the settlement agreement. Thus, the Winding Up Court which heard the setting aside application, had never found that the WU order to be irregular or a nullity. Thus, *the WU order's regularity was never challenged, but the WU order was still sought to be set aside in view of the settlement agreement entered into between the appellants and Accupro*.

**[26]** In fact, the respondent's act to enter into the settlement agreement to seek leeway from the appellant's to set aside the WU order was a clear admission to the validity and regularity of the WU order. *If indeed the WU order was irregular, then the respondent would not have to enter into the settlement agreement. Instead, the respondent could have just applied to have the WU order be set aside*. The entry into the settlement agreement was necessitated by the fact that the respondents knew that they had no valid challenge against the validity and regularity of the WU order.

**[27]** For all intents and purposes, when the Winding Up Court decided to set aside the WU order, the Winding Up Court had decided so on the pretext of the existence of the settlement agreement. The appellants did not object against the setting aside application in respecting the request of the respondents and in mutual agreement of the terms of the settlement agreement. Thus, the Winding Up Court had set aside the WU order purely in reliance of the parties' autonomy to settle their dispute *AND NOT ON ANY POINT OF NULLITY OF THE WU ORDER*.

**[28]** Thus, the court was already *functus officio* (on the WU order) when the Winding Up Court had set aside the WU order to respect the parties' mutual agreement to settle. Therefore, it would be wrong for the respondent to file the OS before a different court, to decide on the validity of the WU order for the third time around.

**[29]** Thus, upon the finding of the court (in the setting aside application) above, the High Court is already *functus officio*. The respondents cannot now take another bite of the proverbial legal cherry and seek to nullify the WU order before another High Court (as they had done so in this appeal). In fact, the respondents here were attempting to take a third bite into the litigation of the same WU order. The WU order was already found to be regular when the WU order was first granted. The WU order was again found to be valid during the setting aside application (but was only set aside in view of respecting the settlement agreement). Thus, the first respondent's OS would be the third time the same WU order would have been re-litigated. Surely, we cannot condone the respondents' parade through multiple courts re-litigating the same singular WU order.

**[30]** In absence of any irregularity to impugn the validity of the WU order, it was certainly wrong for the learned JC to reverse the two prior orders of the High Court to now finding that the WU order was a nullity (for the alleged failure to serve or inform the adjourned hearing date of the petition to SME Majujaya). The underlying facts of the WU order had for years been within the knowledge and awareness of the respondents. If there was any genuine semblance of truth of this alleged failure by the appellants, then the respondents would have never proceeded to perform the settlement agreement for a whole two years. Thus, it was certainly more probable than not that the respondents were aware that the WU order was regularly obtained.

**[31]** The learned counsel for the appellants rightfully referred to the Court of Appeal decision in *Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd* [2011] 5 MLJ 416:

> On the jurisdictional issue, *this court is of the view that the learned judge of the KL–D8 court clearly has no jurisdiction to set aside or rescind a winding up order earlier made and perfected by another High Court*, in this case the Ipoh High Court on 21 June 2007. The KL–D8 Court *had already been functus officio and the matter is res judicata*. Even if the decision of the Ipoh High Court in granting the winding up order is wrong, it should have been dealt with by the Court of Appeal (on appeal by the respondent), but not to be set aside or rescinded by another High Court of concurrent jurisdiction.
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> *The Companies Act 1965* or the Companies (Winding-Up) Rules 1972 *make no express provision enabling the High Court to set aside or rescind a winding up order after it had been made and perfected. The scheme of the Act is such that an aggrieved party may under s 253 of the Act appeal against a winding up order, or apply to stay to proceedings under s 243 of the Act altogether* or for a limited time, under terms and conditions which the court thinks fit (see *Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd* [1996] 4 MLJ 343; and *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325).

**[32]** All of the above in this part considered, we hereby answer *issue 1 in the NEGATIVE*. It was wrong for the learned JC to re-litigate and making a third subsequent decision regarding the impugned WU order which the prior High Courts had already confirmed its validity and only set aside in view of the settlement agreement.

ISSUE 2: WHETHER THE RESPONDENTS HAD COME TO COURT WITH CLEAN HANDS OR OUGHT TO BE ESTOPPED FROM WIELDING ILLEGALITY AS A FRONT TO UNJUSTLY RENEGE FROM THE RESPONDENTS' OWN SERIES OF ADMISSIONS

**[33]** The respondent's wielding of 'illegality' was nothing short of appalling. For many years both the WU order and the settlement agreement was admitted, accepted, acknowledged, and even performed as valid instruments. But now when the respondents delinquently breached the payment terms of the settlement agreement, the respondent suddenly wielded a contention on illegality to mask their blatant breach against the settlement agreement.

**[34]** It was patently obvious to this court that the respondents had no due observance or consideration to any cohesion and consistency of arguments in trying to favourably disguise their breaches. At one breath, the respondents insisted that the WU order was a nullity. But when SME Majujaya already benefited from the lifting of the WU order (by purview of the settlement agreement) the respondent within the same breath now desperately sought to contend the issue of 'undue preference' (which was a consequential effect exclusively attached to the WU order). It was neither here nor there and it was anywhere that the respondents arbitrarily deem it to be.

**[35]** Succinctly, the respondents intended to invalidate the WU order. Hypothetically, if we were to agree that the WU order was invalid, then the issue of undue preference would not arise as SME Majujaya would no longer be in liquidation. But the glaring dissonance here was that the respondents were also hinging on the rule of undue preference to invalidate the settlement agreement.

**[36]** The respondents' position was markedly self-contradictory. The respondents admonished the supposedly illegal manner in which the WU order was obtained but at the same time contended that the appellant had transgressed the rule of undue preference. It need be reminded that the appellants were the petitioners who initially put SME Majujaya in the state of liquidation. The appellants were judgment creditors and they were well within their rights to pursue an action to wind up SME Majujaya.

**[37]** Now, when the WU order was lifted with no contest (in view of the

settlement agreement entered), the issue of undue preference no longer applies or existed as SME Majujaya was no longer in liquidation. Thus, since SME Majujaya was put back as a going concern, then SME Majujaya was certainly bound to make good of all the debts it owed to the appellants. Consequently, both the first respondent and second respondent (as guarantor) were bound to oblige and obey the terms of the settlement agreement they had entered with the appellants.

**[38]** It was gravely unjust for the respondents to abuse the appellants' amiableness to not contest the setting aside application in earnest (as per the settlement agreement) and later wield the appellants' non-contest of the setting aside (and reliance of the settlement agreement) as a weapon to impugn both the settlement agreement and the WU order. We are most minded that the appellants' involvement and depositions before the Winding Up Court were mere formalities to solidify the settlement agreement. Had the appellants had the foresight of the respondents' foul play now, we are resolutely confident that the appellants would not have been all too willing to play along with the respondents' grounds of setting aside the WU order.

**[39]** Thus, firstly the respondents had not come before the High Court with clean hands. The respondents had for two years performed the settlement agreement and had only availed the issue on illegality after they had failed to continue their payment obligations under the settlement agreement. This abhorrent flip flop of stances had glaringly transgressed the trite principle that no party can stake a claim or defence based on its own breach or delinquency. We draw guidance from the Federal Court's decision in *Khatijah bt Abdullah & Ors v Mohd Isa bin Biran* [2017] 2 MLJ 1:

> The respondent herein ought not to be allowed to insist that the SPA is still valid and enforceable when, for the last 20 years, he had demonstrated a lackadaisical attitude to complete the sale transaction. In the case of *Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* the Supreme Court had held that *'the blameable party cannot be permitted to take advantage of his own wrong'*.

**[40]** The Federal Court expressed the same sentiment in *Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor & Ors* [2016] 8 MLJ 289:

> Thirdly, the argument that there is no exclusivity or sufficient control to prevent interference because the third respondent had built permanent structures on the claimed lands within the Endau Rompin National Park is clearly flawed *by reason of the trite principle that one cannot take advantage of one's own default. The application of the legal principle that a party cannot benefit from his own breach or default* can be seen in the case of *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489.

**[41]** It was also thoroughly unjust that the respondents seek to impugn the

settlement agreement but at the same time seeks to rely on the effects of the liquidation to support its self-contradictory crusade to impugn the settlement agreement. The respondents ought not to be allowed to blow both hot and cold at the same time. Since the respondents had for years performed the settlement agreement, the respondents are ought to be estopped from unjustly denying the validity of the settlement agreement.

**[42]** Furthermore, it was gravely unjust that the respondents now cry foul against the very same settlement agreement they had proposed, agreed to, and was complicit in together with the appellants.

**[43]** Suffice that we refer to the celebrated Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331:

> When the parties to a transaction *proceed on the basis of an underlying assumption either of fact or of law* — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — *neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so. It would facilitate moral decadence within our social structure*.

**[44]** All of the above in this part considered, we hereby answer *issue 2 in the NEGATIVE*. It was resoundingly clear that the respondents had NOT come to court with clean hands and were ought to be estopped from wielding illegality as a front to unjustly renege from the respondents' own series of admissions

WHETHER THE SETTLEMENT AGREEMENT WAS ILLEGAL BY TRANSGRESSING THE RULE OF UNDUE PREFERENCE UNDER S 528 OF THE COMPANIES ACT 2016

**[45]** We will answer this issue in two-folds. *FIRSTLY*, we are of the mind that the settlement agreement does not transgress the rule of undue preference. We find so on the following grounds:

(a) the settlement agreement was entered into by the proposal and request of the respondents. The direct consequence of the settlement agreement was that SME Majujaya would be lifted out of liquidation and went back to become a going concern;

(b) this was not a case where the third party's (the first respondent's) payments were made during the period of liquidation. By the time the first respondent's payments were made, SME Majujaya had already enjoyed the benefit of being lifted out of liquidation;

(c) by the operation of the settlement agreement, SME Majujaya no longer had to call for any creditors meeting, nor does the other creditors of SME

Majujaya can immediately call for their debt by filing a proof of debt. Since SME Majujaya was no longer in liquidation, it was no longer open for other creditors of whatever priority to latch onto WU order. Thus, the issue of undue preference never arisen; and

(d) furthermore, since the settlement agreement entailed that the respondents personally undertake SME Majujaya's debt and indemnify SME Majujaya, the 'debt' concerned was no longer merely SME Majujaya's debt owed to the appellants. Instead, by operation of the settlement agreement, *the respondents themselves as principal were already indebted to the appellants under the settlement agreement*. There shall be no issues as to privity of contract as the respondents themselves now personally and contractually owe the debt against the appellants.

**[46]** We draw a parallel to the New Zealand's Court of Appeal case of *Ebert Construction Ltd v Sanson* [2017] NZCCLR 28. In *Ebert*'s case, Takapuna Procurement Ltd ('TPL/developer') was a developer while Ebert Construction was a contractor appointed by the developer. The project developed by the developer was financed by BOS International (Australia) Ltd ('BOSI'). The developer went into liquidation. There was an agreement entered in which BOSI had undertaken to directly pay to the contractor whatever the developer owed to the contractor for its works. The Court of Appeal was faced with the determination on whether or not such direct payments from BOSI to the contractor as creditor would offend the rule against undue preference.

**[47]** The New Zealand Court of Appeal found that the direct payments by the third party, BOSI made to the creditor (contractor) relinquishing the debts of the developer owed to the contractor *'WAS NOT AN 'INSOLVENT TRANSACTION'* which contravenes the rule against undue preference. The New Zealand Court of Appeal had found so on the following grounds:

(a) upon the operation of the direct payment agreement (alike the settlement agreement in the appeal before us) BOSI owed the amounts personally as principal under the direct payment agreement;

(b) the direct payments made in actuality relinquished dues owed by BOSI directly to the contractor under the direct payment agreement, and not necessarily the dues owed by the developer to the contractor;

(c) when the debt was undertaken to be personally paid by BOSI, the debt was already BOSI's own debt and no longer merely any dues owed by the developer to the contractor; and

(d) the direct payments under the direct payment agreement *did not disturb the general pool of the developer's liquidity as the debt paid was: (i) paying off BOSI's own debt to the contractor; and (ii) was paid off of BOSI's monies or coffer and not the developer's monies*:

> First, we accept Mr Goddard's submission that *BOSI was directly liable to Ebert*. That, of course, is the whole point of a direct payment agreement. But it is also the commercial arrangement in this appeal, in both substance and reality. *The direct agreement creates privity between Ebert and BOSI*.
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> ...
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> *Secondly, we find that BOSI's direct liability to Ebert is as principal in its own right. We do not accept Mr Tingey's argument that BOSI pays as agent for TPL.*
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> ...
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> Fifthly, it is of essence in the avoidance of preferential payment 'by the company' that *the funds (or asset conveyed) are from resources available to the company* to pay its general creditor

**[48]** The position in *Ebert* would be consistent with s 528 of the Companies Act 2016 as one of the key elements of preferential treatment was that the payments must come from the wound up company's own monies:

> 528 (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which is unable to pay its debts, as the debts become due, *FROM ITS OWN MONEY* in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors in the event of the company being wound up on a winding up petition presented within six months from the date of making or doing the same and every such act shall be deemed fraudulent and void.

**[49]** The principle in the case of *Ebert* above applies *mutatis mutandis* to the appeal before us. Alike BOSI, the respondents were directly indebted to the appellants under the settlement agreement. Moreover, when the first respondent remitted the payments to the appellants, the payments were: (i) made out of the first respondent's coffer or monies; and (ii) made to relinquish the first respondent's own debt owed to the appellants under the settlement agreement.

**[50]** *SECONDLY*, in very recent times, our apex court had also followed the English position in the UK Supreme Court's landmark decision in *Patel v Mirza* [2016] UKSC 42. In *Patel*'s case, the UK Supreme Court dealt with a similar circumstance where a delinquent contracting party had sought to excuse himself out of a breach by brandishing illegality as means to invalidate the entire contract he was initially bound to.

**[51]** In *Patel*'s case, the UK Supreme Court had to reconsider and rethink the rigidity of the trite rule against illegality (the latin maxim of *ex turpi causa non oritur actio*) that might unfortunately cause a co-conspirator to an illegality to be unjustly enriched, at the expense of the other co-conspirator grave loss. The legal dilemma was this:

(a) on one hand, it would be good precedent for the court to not breathe life into any illegal contract so as to deter any person from considering to be embroiled in an illegal agreement. Good public policy would have it that no party should be allowed to seek any remedy from the court arising from illegal contracts. Otherwise, subjects of the law would not be deterred from entering into illegal contracts knowing that they can obtain some form of reparation *vide* the court; and

(b) on the other hand, it would also be undesirable that the court would leave any 'victim' or co-conspirator to an illegal contract to be without remedy when his monies were unjustly kept in the possession and control of the other co-conspirator. This would unjustly enrich the other co-conspirator and thus, would encourage people to engage in nefarious schemes to defraud other co-conspirators knowing that they're unjust enrichment would not be curtailed by the court.

**[52]** In view of the above dilemma, the UK Supreme Court decided that the court may order compensation arising from an illegal contract on the two conditions that:

(a) the order for compensation was not contrary to any public policy; and

(b) the order for compensation would not lead to a disproportionate reparation compared to the nature of the illegality involved.

**[53]** The UK Supreme Court's decision had found favour and application within our courts in the Federal Court case of *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141:

> Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. *We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality.*
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> ...
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> In addition, we find that the test laid down by Lord Toulson in Patel that is to say, the trio considerations, is a sensible one, which we should follow. *Applying the test to the facts of this case, we find that it is an OVERKILL for the first defendant to lose the subject land for the infringement of the two Acts* which is punishable by a fine upon conviction.

**[54]** We must *APPROPRIATELY CAVEAT* that our application of the principle in *Patel v Mirza* (and our inclination to assist the appellants in the appeal before us) was incentivizsed by the specific and niche facts (which entailed the respondents' unconscionable conducts which would unjustly deprive a legitimate judgment creditor for monies which were legitimately due to be paid to the appellants). We remain in full and unmitigated agreement that

as far and as much as possible, the courts shall not lend any hand to assist any persons to obtain any remedy whatsoever arising from an illegal contract. This appeal becomes an exception to the rule only because:

(a) the monies paid was not exclusively for the purposes of an illegal transaction. Instead it was paid for the legitimate payments to settle a judgment sum ordered by the High Court. The alleged illegality was only an unfortunate collateral technicality from the niche dilemma that the judgment debtor happened to be in liquidation;

(b) as we have elucidated at length above, the monies already paid (and still yet unpaid) to the appellants were rightfully monies which was due and owed by SME Majujaya (under a court order) as well as the respondents under the settlement agreement. Thus, the monies that the appellants are attempting to recover were by no means illegal; and

(c) the respondents' unconscionable conduct was compounded by the fact that the settlement agreement was proposed by the respondents themselves. In fact, SME Majujaya had moved the High Court to set aside the WU order in order to give way to the performance of the settlement agreement. In furtherance of the same, the first respondent had even partially performed and paid almost 40% of the sum owed under the settlement agreement within the span of two years.

**[55]** Even if the settlement agreement might offend the rule against undue preference (which we already found that it had not), public policy dictates that the respondents ought not to be left unscathed especially considering the fact that the respondents had taken the parties and even the courts for a ride for years. The respondents' unsavoury conducts by and large had undermined the integrity of the court and abused the process of the court.

**[56]** Thus, it would be vastly unjust and a total 'overkill' for us to simply invalidate the settlement agreement and deprive the appellants of just deserts. It would certainly be an overkill to now invalidate the settlement agreement as:

(a) the appellants would unjustly be deprived of the fruits of their litigation as SME Majujaya had already enjoyed the benefits of the settlement agreement by being lifted out of liquidation;

(b) not only the appellants would be deprived of monies already paid to them, the appellants would also be deprived of monies that were already outstanding and due to them under the settlement agreement and the WU order; and

(c) in fact, the learned JC's orders would effectively and unjustly turn the tables against the appellants as successful litigants because they now owe

monies (beyond what was paid to them under the settlement agreement) in costs and interests to the real delinquents (being SME Majujaya and the respondents).

**[57]** Therefore, in view of the positions of the law in *Ebert*'s case and *Patel*'s case above, our decision to uphold the validity of the settlement agreement shall remain unchanged notwithstanding the respondents' unjust wielding of the principle of illegality. It would be gravely against public policy to allow the respondents to undermine the integrity of the courts and to abuse the process of the court (by taking the parties and the court for a ride for many years).

**[58]** The aforementioned deliberations in this part considered, we hereby answer *issue 3 in the NEGATIVE*. The settlement agreement was *NOT ILLEGAL* and had *NOT TRANSGRESSED* the rule of undue preference under s 528 of the Companies Act 2016.

OUR DECISIONS AND ORDERS

**[59]** All of the above considered, we unanimously find that there are clear merits to this appeal. We hereby *ALLOW* the appellants' appeal and accordingly set aside the learned JC's decision for allowing Accupro's (the first respondent's) OS.

**[60]** We also hereby set aside the learned JC's decision for dismissing the appellants' counterclaim mounted against Accupro, Tan Chin Siea, and SME Majujaya. We accordingly allow the appellants' counterclaim in the following terms:

(a) we declare that the settlement agreement to be a valid agreement under the law; and

(b) we find that Accupro was in breach of the settlement agreement as they have failed to fulfil its payment obligations under the settlement agreement.

(c) since Accupro had breached the settlement agreement, then the appellants are entitled to immediately call and claim for the remainder sum unpaid under the settlement agreement (RM221,143.28) ('judgment sum') against the first respondent, Accupro;

(d) we also find that Tan Chin Siea as guarantor is also jointly and severally liable with Accupro to pay the judgment sum to the appellants;

(e) we accordingly order that the judgment sum be paid to the actual privies of the settlement agreement (being the appellants); and

(f) we also order interest of 8%pa on the judgment sum from 1 June 2021 to the date of full and final settlement of the judgment sum.

**[61]** We also order costs of RM20,000 here and below to be paid by the respondents to the appellants subject to allocator.

**[62]** For completeness, we also dismiss the appellants' preliminary objection against the deliberation on the issues on undue preference and usurpation of liquidator's control as these issues either had already been answered by us in our judgment or were already moot considering our judgment above.

**[63]** We are also aware of the respondents' own interlocutory appeal in Appeal No B-02(IM)(NCC)-699–04 of 2022 against the learned JC's decision in allowing the adding of SME Majujaya and Tan Chin Siea as co-defendants in the appellants' counterclaim ('Appeal 13'). The learned counsel for the respondents had sought to withdraw Appeal 13. We are hereby minded to strike out Appeal 13 with costs of RM5,000 subject to allocator.

*Appeal allowed, High Court's decision set aside and appellants' counterclaim allowed.*

Reported by Ashok Kumar